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No.

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1984

KAREN A. COOPER,
*Petitioner,*

VS.

UNITED STATES POSTAL SERVICE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether the requirement of 42 U.S.C. section 2000e-16(c) that a Title VII complaint against the federal government be filed with the court within thirty days of receipt of notice of final administrative disposition of a discrimination complaint is a jurisdictional prerequisite to suit in federal court, or, like a statute of limitations, is subject to waiver, estoppel or equitable tolling.

2. Whether, in jurisdictions where timely service of process can be effected after a statute of limitations has run, the requirement of F.R.C.P. Rule 15(c) that a new defendant have received notice "within the period provided by law for commencing an action against him" should be interpreted to include a reasonable time for service of process.

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OCTOBER TERM, 1984

KAREN A. COOPER,
*Petitioner,*

vs.

UNITED STATES POSTAL SERVICE,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Karen A. Cooper petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, No. 83-6106, slip op. at 3025 (9th Cir. Jul. 12, 1984), (App., infra, A-1—A-8) is reported at ..... F.2d ..... The opinion of the district court (App., infra, A-9—A-11) is reported at 578 F.Supp. 846 (S.D. Cal. 1983).

## JURISDICTION

The judgment of the court of appeals (App., infra, A-12) was entered on July 12, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

## STATUTES INVOLVED

Section 717(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-16(a), provides in relevant part:

> All personnel actions affecting employees or applicants for employment . . . in the United States Postal Service . . . shall be made free from any discrimination based on race, color, religion, sex or national origin.

Section 717(c) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e-16(c), provides in relevant part:

> Within thirty days of receipt of notice of a final action taken by a department, agency, or unit referred to in subsection (a) of this section . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Rule 15(a) of the Federal Rules of Civil Procedure, provides in relevant part:

> *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.



Rule 15(c) of the Federal Rules of Civil Procedure provides:

> *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.
>
> The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

Federal Rules of Civil Procedure, Rule 3 provides:

> *Commencement of Action.* A civil action is commenced by filing a complaint with the court.

Federal Rules of Civil Procedure, Rule 4(a) provides in pertinent part:

> (a) *Summons: Issuance.* Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint.

## STATEMENT

This case involves the statutory construction of section 717(c) of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-16(c), and the interpretation to be given Rule 15(c) of the Federal Rules of Civil Procedure in Title VII cases against the United States in which the plaintiff initially sues an improper defendant and later seeks to amend her complaint to substitute the proper defendant. The case presents two related procedural issues. First, does section 717(c) of Title VII require that a plaintiff who alleges that she has been subjected to employment discrimination by the federal government file an action naming the proper defendant within thirty days after receiving notice of right to sue, or have her action dismissed for lack of federal subject matter jurisdiction? Second, under Rule 15(c) of the Federal Rules of Civil Procedure, can a plaintiff, who within the thirty-day period filed an action under section 717 naming the wrong defendant, later amend her complaint to name the proper party defendant, so long as the new defendant has received notice of the action within a reasonable time after its commencement?

## FACTS

Petitioner, Karen A. Cooper, worked as a distribution clerk for the United States Postal Service in its San Diego main branch for approximately nine years. Thereafter, Ms. Cooper applied for a part-time letter carrier position and was denied that position, allegedly because of her sex.

Ms. Cooper filed a timely employment discrimination charge against the United States Postal Service in which she set out the acts giving rise to this action. On September



30, 1982, Ms. Cooper received the final agency decision, dated September 24, 1982, from the United States Postal Service on her discrimination charge. The decision closed Ms. Cooper's case with a finding of no discrimination and stated that Ms. Cooper could institute a civil action in the appropriate United States District Court within thirty days of the letter's receipt.

On October 29, 1982, Ms. Cooper filed a complaint in federal district court alleging, *inter alia,* a violation of section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-16, which prohibits discrimination in federal employment.[1] The complaint named the United States Postal Service as the defendant. In her complaint, plaintiff properly invoked the jurisdiction of the district court pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sections 2000e-16(c) and 2000e-5(f)(3). The complaint was served on the United States Attorney and the Attorney General in January 1983, and on the Postmaster General, William F. Bolger, in February 1983.

Respondent Postal Service moved to dismiss petitioner's complaint under Federal Rules of Civil Procedure, Rule 12(b)(2) for lack of subject matter and personal jurisdiction, and under Rule 12(b)(6) for failure to state a claim

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[1]In her complaint plaintiff also alleged a violation of her civil rights under 42 U.S.C. sections 1983 and 1985. Plaintiff's First Amended Complaint additionally alleged a violation of 42 U.S.C. section 1986. Consideration of these other claims is not necessary to the resolution of the questions presented to the Court. After filing her initial action in federal court, Ms. Cooper added an additional claim for retaliation under section 704 of Title VII, 42 U.S.C. section 20000e-3.

upon which relief could be granted.[2] Respondent asserted in its motion to dismiss that, pursuant to 42 U.S.C. section 2000e-16(c), the head of the Postal Service, Postmaser General William F. Bolger was the only proper party defendant in an action under section 717. Respondent further asserted that petitioner's failure to name Bolger in her initial complaint filed within the thirty-day period deprived the court of subject matter jurisdiction and rendered that complaint subject to dismissal for failure to state a claim upon which relief could be granted.

Petitioner Cooper filed a cross motion under Rule 15 of the Federal Rules of Civil Procedure to amend her complaint to name William F. Bolger as the defendant. In her motion plaintiff argued that, under Rule 15(a), leave to amend should be freely granted when justice so requires, and that in light of this provision and the absence of prejudice to the defendant, she should be given an opportunity to amend her complaint to state the proper defendant.

The district court denied petitioner's motion to amend her complaint and granted respondent's motion to dismiss the action with prejudice. The court held that under Title VII, the proper party defendant in a 717 action is the "head of the department, agency or unit, as appropriate," and that since petitioner had named only the United States Postal Service and Does 1 through 50, her complaint had to

[2]In addition, the Government moved to strike those allegations in plaintiff's complaint referring to 28 U.S.C. sections 1343(3) and 1343(4) (jurisdiction over cases alleging deprivation of civil rights under color of state law), 42 U.S.C. sections 1983 and 1985, and plaintiff's prayer for injunctive relief, compensatory and punitive damages, and plaintiff's request for a jury trial.



be dismissed (App. B, *infra*, A-10—A-11). The district court denied petitioner's motion to amend on the ground that the United States Government did not receive actual notice of the commencement of the action within the thirty-day filing period set out in section 717, as allegedly required by Rule 15(c).

The United States Court of Appeals for the Ninth Circuit affirmed. First, the Ninth Circuit held that the thirty-day time limit for filing an action under 717 is jurisdictional in nature and is not, like a statute of limitations, subject to waiver, estoppel, or equitable tolling (App., *infra*, A-1—A-8). Second, while acknowledging the lack of unanimity among the circuits concerning the proper interpretation of Rule 15(c)'s notice requirement, the Ninth Circuit stated that it adhered to a literal interpretation of that rule. In conformity with this interpretation, the court held that Cooper's failure to notify the proper defendant until after the thirty-day period had passed precluded application of Rule 15(c) to save Cooper's claims (App., *infra*, A-7).

## REASONS FOR GRANTING PETITION

Certiorari should be granted in this case for three reasons. First, there exists a sharp conflict between the circuits with respect to both of the questions presented. Second, the Ninth Circuit's holding that the time period for the commencement of an action under section 717 is jurisdictional conflicts with this Court's recent decision in *Baldwin County Welcome Center v. Brown*, ..... U.S. ....., 104 S. Ct. 1723 (1984). Third, the Ninth Circuit's decision regarding the proper interpretation of Rule 15(c)'s notice requirement involves an important question of federal law which has not yet been decided by this court and conflicts with the

purpose of Rule 15(c) as presented by the Advisory Committee in its Note on the 1966 Amendment to that Rule.

**1. Conflict Between the Circuits**

**a. The Jurisdictional Issue**

The decision below that the thirty-day filing period in section 717 is jurisdictional conflicts with the decision of the Tenth Circuit in *Martinez v. Orr*, 738 F.2d 1107 (10th Cir. 1984), as well as with prior decisions of the Fifth, Eleventh and District of Columbia Circuits. *Sessions v. Rusk State Hospital*, 648 F.2d 1066 (5th Cir. 1981) (holding that ninety-day time period in private employer actions under section 706(f) is not jurisdictional); *Milam v. United States Postal Service*, 674 F.2d 860 (11th Cir. 1982); *Saltz v. Lehman*, 672 F.2d 207 (D.C. Cir. 1982). On the other hand, the Ninth Circuit's position is consistent with that taken by the Seventh Circuit in *Sims v. Heckler*, 725 F.2d 1143 (7th Cir. 1984) and the Sixth Circuit in *Rea v. Middendorf*, 587 F.2d 4 (6th Cir. 1978).

The view of the Fifth, Tenth, Eleventh and District of Columbia Circuits is best exemplified by the Tenth Circuit's decision in *Martinez*, 738 F.2d 1107, which held that the thirty-day time limit of section 2000e-16(c) is not jurisdictional, but is, like a statute of limitations, subject to waiver, estoppel and equitable tolling. In reaching this conclusion, the Tenth Circuit relied on the decision of the United States Supreme Court in *Zipes v. Trans World Airlines*, 455 U.S. 385 (1982), which held that the filing of a timely charge of discrimination with the Equal Employment Opportunity Commission is not jurisdictional but is subject to equitable tolling. 455 U.S. at 393. Neither the Sixth, Seventh, or Ninth Circuit decisions takes *Zipes* into account.



The result of these divergent interpretations of section 717's thirty-day requirement has been and continues to be a gross inequality of enforcement of Title VII in actions against the federal government. When a plaintiff brings an action initially naming an improper defendant in a circuit that interprets the thirty-day limit as jurisdictional, she will, on the basis of a procedural technicality, lose her opportunity to vindicate her civil rights. On the other hand, her counterpart, who files a complaint containing the same minor error in a circuit that permits equitable tolling, will be allowed to proceed to a determination on the merits of her claim. It is incumbent on this Court to provide a uniform interpretation of section 717(c) which will ensure that federal employees have access to the courts to vindicate their civil rights on an equal basis throughout the country.

This sharp conflict in the circuits has produced a significant disparity in the disposition of Title VII actions, depending solely on whether the Title VII plaintiff has brought her action within a circuit which views the thirty-day period as jurisdictional, or whether the action was brought in a circuit where equitable tolling is recognized. The question presented here determines the continued viability or summary disposal on procedural technicalities of Title VII discrimination cases against the federal government. The question is of crucial importance to the hundreds of plaintiffs who now have Title VII cases against the federal government pending in the judicial system and to potential government employees who may in the future bring actions under this law. This Court should

resolve the disagreement over the interpretation of this important federal statute.

**b. The 15(c) Issue**

With respect to the second question presented, the Ninth Circuit's holding in this case that Rule 15(c) requires actual notice to a new defendant within the statutory time period conflicts with the interpretation given that rule by the Second Circuit in *Ingram v. Kumar,* 585 F.2d 566 (2nd Cir. 1978), *cert. denied,* 440 U.S. 940 (1979), by the Fifth Circuit in *Kirk v. Cronvich,* 629 F.2d 404 (5th Cir. 1980), and by the Sixth Circuit in *Ringrose v. Engelberg Huller Co.,* 692 F.2d 403 (6th Cir. 1982).

The position of the Second, Fifth and Sixth Circuits is best explicated by the Second Circuit's decision in *Ingram v. Kumar,* 585 F.2d 566. In its opinion, the court implies that in states where service of process must be effected within the statute of limitations period, Rule 15(c)'s requirement that actual notice be received "within the period provided by law for the commencement of the action" is properly construed as requiring notice on a substituted defendant within the statutory limitations period. However, notes the court, in many states and under the federal rules, timely service can be made on a defendant after the statute of limitations has run; it is only the filing of a complaint which must be completed before the statute runs. In these states, and in federal courts hearing federal question cases, "the period provided by law for commencing the action" includes a reasonable time following the expiration of the statute of limitations for service of



process.[3] Consequently, the Second Circuit view holds that in jurisdictions permitting post-statute of limitations service of process under Rule 15(c) the period within which "the party to be brought in" must receive notice of the action includes a reasonable time as allowed for service of process. 585 F.2d at 571-572.

The Ninth Circuit view adopted in the court below, which is also the view adhered to by the Seventh Circuit in *Hughes v. United States,* 701 F.2d 56 (7th Cir. 1982) and *Stewart v. United States,* 655 F.2d 741 (7th Cir. 1981), interprets the phrase "the period provided by law for the commencement of the action" to mean only the statute of limitations period. It does not interpret that period to include a reasonable time for the service of process, even in those jurisdictions which permit an initial defendant to be served after the statutory period has passed.

This conflict between the circuits results in unequal treatment not only of civil rights plaintiffs, but of litigants in all types of cases in federal court who initially sue the "wrong" defendant. This problem has arisen in hundreds of different factual contexts, and it will undoubtedly continue to do so. *See* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 1498 (Supp.); Note: *Federal Rule of Civil Procedure 15(c): Relation Back of Amendments,* 57 Minn. L. Rev. 83 (1972). It is plainly inequitable and

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[3]See Federal Rules of Civil Procedure, Rules 3 and 4(a). Presumably, in a diversity case, whether the "period provided by law for the commencement of the action" would include reasonable post-statute time for service of process would depend on whether, in the state where the court sat, the statute was tolled by filing of a complaint or by service of process. *See, Ragan v. Merchants Transfer and Warehouse Co.,* 337 U.S. 530 (1949).

injurious to the effective administration of justice for the substitution of an initially misnamed defendant to relate back to the filing of the initial complaint in one circuit, thus saving a plaintiff's claims, when the exact same facts would lead to dismissal of a plaintiff's case in another circuit. In addition to this unjust difference in treatment, the conflict between the circuits is creating substantial confusion and uncertainty in the district courts in circuits which have yet to rule on this issue. For both of these reasons, this Court should review the Ninth Circuit decision and resolve the disagreement over the proper interpretation of Rule 15(c).

**2. Conflict With Applicable Supreme Court Precedent**

Review should also be granted because the decision below regarding the "jurisdictional" nature of section 717 failed to consider and conflicts with the recent United States Supreme Court decision in *Baldwin County Welcome Center v. Brown,* ..... U.S. ....., 104 S. Ct. 1723 (1984).

The Ninth Circuit *Cooper* decision is predicated on the assumption that the thirty-day filing requirement of Section 717(c) is jurisdictional (App., *infra,* A-1—A-8). The *Baldwin County Welcome Center* case, decided April 16, 1984, sharply undercuts that assumption, thus raising serious questions about the basic theoretical underpinning of *Cooper.*

In *Baldwin County Welcome Center,* ..... U.S. ....., 104 S. Ct. 1723, the United States Supreme Court reviewed a decision of the Eleventh Circuit which had excused a Title VII plaintiff's failure to comply with the ninety-day filing period contained in section 706(f)(1) of the Act, 42 U.S.C. section 2000e-5(f)(1), which section applies to suits against



private employers. The *Baldwin County* Court did not hold that the section 706(f)(1) time limit was jurisdictional. Rather, it applied its prior conclusion in *Zipes v. Trans World Airlines,* 455 U.S. 385 and reviewed the Eleventh Circuit's decision for facts which would justify the application of equitable tolling. ..... U.S. ....., 104 S. Ct. at 1725. Finding no facts in the record which would call for application of that doctrine, the Court reversed the decision of the Eleventh Circuit. ..... U.S. ....., 104 S. Ct. at 1726.

The Supreme Court's decision in *Baldwin County* is thus premised on the proposition that the ninety-day filing limit for private employee actions is not jurisdictional, but is, like a statute of limitations, subject to waiver, estoppel and equitable tolling. *See, Baldwin County Welcome Center v. Brown,* ..... U.S. ....., 104 S. Ct. 1723, 1731 (Stevens, J., dissenting). Given that the Supreme Court views the section 706(f)(1) time limit for private employee actions as being subject to equitable tolling, the Ninth Circuit in *Cooper* erred in holding that the filing limit for federal employee actions under section 717 is jurisdictional. The legislative history supporting the addition of section 717 to Title VII in 1972 makes clear that substantive procedural rules governing section 717 actions by federal employees should be congruent with rules applicable to private employee actions. *See,* H.R. REP. No. 1746, 92d Cong., 2d Sess. 103, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2157-60. *See also, Martinez v. Orr,* 738 F.2d at 1110. The conflict between the decision rendered below and the *Baldwin County Welcome Center* decision requires that this Court promptly review the decision below to ensure uniformity with the Court's prior decisions.

### 3. Important Issue Not Yet Addressed By This Court

Review is also required because the interpretation of Rule 15(c)'s notice requirement in the context of a plaintiff's attempt to substitute a proper for an improper defendant has not yet been addressed by this Court, and because the Ninth and Seventh Circuit's interpretation of 15(c) is incorrect.

The primary purpose of the 1966 Amendment to Rule 15(c) was to rectify the unjust results being reached prior to that time in cases brought under the Social Security Act, in which cases plaintiffs frequently named the United States, or the Department of Health, Education and Welfare as defendants in actions seeking review of denials of Social Security benefits. *See Advisory Committee Note of 1966 to Rule 15(c).* Under the Social Security Act, an action to review an agency's decision must be brought within sixty days after that decision and must name as the defendant the Secretary of Health, Education and Welfare. In numerous cases, directly analogous to the case now before the Court, Social Security claimants instituted timely actions, but mistakenly named as defendant a party other than the Secretary of Health, Education and Welfare. Discovering their mistakes, the claimants moved to amend their complaints to name the proper defendant. But, because the sixty day period had expired, their motions were denied and their cases dismissed. *See, Advisory Committee Note of 1966 to Rule 15(c):* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 Harvard L. Rev. 356 (1967); Byse, *Suing the 'Wrong' Defendant in Judicial Review of Federal Administrative Action: Proposals for*



*Reform,* 77 Harvard L. Rev. 39 (1963). Rule 15(c) was adopted to ensure that these claims could be decided on their merits, rather than being subjected to dismissal on technical procedural grounds at odds with Rule 15(a)'s injuncton that leave to amend be freely granted when the interests of justice so require.

With respect to suits against the federal government, the new rule provided that the delivery or mailing of process to the United States Attorney or to the Attorney General, in accordance with F.R.C.P. Rule 4, would satisfy Rule 15(c)'s notice requirement. *Advisory Committee Note of 1966 to Rule 15(c).*

However, both Rule 15(c) and the Advisory Committee Note left unclear whether "the period provided by law for commencing the action", within which time the new defendant must receive notice of the suit, includes a reasonable time after the filing of the complaint for service of process, as is permitted under F.R.C.P. Rules 3 and 4(a). *See Ingram v. Kumar,* 585 F.2d 566, 571 (2d Cir. 1978); *Kirk v. Cronvich,* 629 F.2d 404, 408 (5th Cir. 1980).

It is this ambiguity which has led to conflicting interpretations within the circuits. The restrictive interpretation applied by the Seventh and Ninth Circuits, which interpretation does not permit post-statute service, not only defeats the purpose of the 1966 Amendment, but also leads to the anomalous result that, in a jurisdiction that permits post-statute service of process, a misnamed defendant is entitled to *earlier* notice than he would have received had the complaint originally named him correctly. *Ingram v. Kumar,* 585 F.2d at 571. This anomaly demonstrates that the Ninth Circuit view fails to serve any of the policies

underlying statutes of limitations, which policies are the only legitimate reasons for denying a motion to amend a complaint. *See Advisory Committee Note of 1966 to Rule 15(c):* Kaplan, *supra,* at 408. The view of the Second, Fifth and Six Circuits is congruent with the philosophy underlying Rule 15 that leave to amend should be freely given when justice so requires, and also preserves the policies underlying statutes of limitations by requiring that the new defendant have received notice within a reasonable time after the commencement of the action.

This Court should review the decision below to clarify this important issue of law and to assure that the policies and purposes motivating the 1966 Amendment of Rule 15 are not undermined by an overly restrictive interpretation of that Rule.



## CONCLUSION

For all the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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**(Appendices follow)**

# APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6106
DC No. CV 82-1475-T-M

Filed: Jul. 12, 1984

KAREN A. COOPER, PLAINTIFF-APPELLANT

*v.*

U.S. POSTAL SERVICE, DEFENDANT-APPELLEE

## OPINION

Appeal from the United States District Court
for the Southern District of California
Howard B. Turrentine, District Judge, Presiding

Argued and Submitted April 4, 1984

Before: WALLACE, SCHROEDER, and NELSON, Circuit Judges

WALLACE, Circuit Judge:

Cooper appeals from the dismissal with prejudice of her Title VII complaint. The district court also denied Cooper's motion to amend her complaint and name the proper defendant. The dismissal was based upon a lack of jurisdiction because Cooper failed to file an action naming the proper defendant within the period provided by 42 U.S.C. § 2000e-16(c). We have jurisdiction under 28 U.S.C. § 1291, and affirm.

## I

Cooper is a female employee of the United States Postal Service (USPS). On December 1, 1980, she filed a complaint with USPS's Department of Equal Opportunity, alleging that she had not been selected for a part-time regular carrier position because of gender-based discrimination. On September 30, 1982, Cooper received notice that her claim had been denied and that under 42 U.S.C. § 2000e-16(c) she had thirty days in which to file an action in federal court for violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e-17. On October 29, 1982, one day before the statutory limitations period expired, Cooper filed a complaint naming USPS as the only defendant. She served copies of the complaint on the United States Attorney and the Attorney General in January of 1983, and on the Postmaster General one month later. The record does not indicate when USPS was served. Cooper concedes that she served none of these parties within the thirty-day period that expired on October 30, 1982.

The government subsequently moved to dismiss Cooper's complaint on the ground that she had not named the Postmaster General, who was the proper defendant under 42 U.S.C. § 2000e-16(c). Cooper responded by moving to amend her complaint and substitute the Postmaster General as a defendant under rule 15(c) of the Federal Rules of Civil Procedure. The court denied Cooper's rule 15(c) motion because the Postmaster General had not received notice of Cooper's action within the statutory thirty-day period. The district court also concluded that it lacked jurisdiction because of Cooper's failure to name the proper defendant and dismissed her complaint with prejudice. As the district judge clearly intended his order to be a final disposition



of the case, we treat his order as dismissing the action. *Ruby v. Secretary of United States Navy,* 365 F.2d 385, 387 (9th Cir. 1966).

## II

On appeal, we must determine whether the district court abused its discretion by denying Cooper's motion to substitute the Postmaster General for USPS in her Title VII action. *See Korn v. Royal Caribbean Cruise Line, Inc.,* 724 F.2d 1397, 1399 (9th Cir. 1984) (*Korn*). Our analysis depends on the interplay of 42 U.S.C. § 2000e-16(c) and rule 15(c) of the Federal Rules of Civil Procedure. The former, which governs civil actions against the federal government for Title VII violations, states in part:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit . . . on a complaint of discrimination based on . . . sex . . ., an employee or applicant for employment, if aggrieved by the final disposition of his complaint, . . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

This section has twofold relevance to Cooper's case. First, its clearly states that "the head of the department, agency, or unit . . . shall be the defendant" in Title VII actions against the federal government. *See, e.g., White v. General Services Administration,* 652 F.2d 913, 916 n.4 (9th Cir. 1981). Thus, the Postmaster General was the only proper defendant for Cooper's action. Second, it gives federal employees only thirty days after receiving notice of final agency action on their claim in which to file suit. *See, e.g., Rice v. Hamilton Air Force Base Commissary,* 720 F.2d

1082, 1083 (9th Cir. 1983) (thirty day limit is jurisdictional).

In view of Cooper's conceded failure to file a complaint against the Postmaster General within the statutory period, her claim must be barred unless her attempt to substitute the Postmaster General as a defendant relates back to the date her original complaint was filed. Rule 15(c), which governs the relation back of amendments to pleadings, states:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Strictly interpreting the rule, the district court determined that the Postmaster General could not be substituted as the defendant under rule 15(c) because he did not "receive such notice of the institution of the action" "within the period provided by law for commencing the action against him." The facts are essentially undisputed. The only issue before us, therefore, is whether the strictures of rule 15(c) should be interpreted other than as literally read.



There is no unanimity among the circuits concerning the proper interpretation of rule 15(c)'s notice provision. The Second, Fifth, and Sixth Circuits have determined that the rule cannot be read literally to require notice to the substitute party within the statutory limitations period. *See Ringrose v. Engelberg Huller Co.*, 692 F.2d 403, 410 (6th Cir. 1982) (Jones, J., concurring) (allowing reasonable period for service of process following expiration of statutory period); *accord Kirk v. Cronvich*, 629 F.2d 404, 408 (5th Cir. 1980); *Ingram v. Kumar*, 585 F.2d 566, 571-72 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979).

Other circuits have literally applied rule 15(c)'s strict notice requirement. *Stewart v. United States*, 655 F.2 741, 742 (7th Cir. 1981) ("Having elected to file suit on the last day of the limitations period, plaintiff requests us to add to that period a 'reasonable time' for service of process. We cannot expand the . . . period established by Congress."); *accord Hughes v. United States*, 701 F.2d 56, 58-59 (7th Cir. 1982). *See also Archuleta v. Duffy's Inc.*, 471 F.2d 33, 34-36 (10th Cir. 1973).

This circuit adheres to a literal interpretation of rule 15(c)'s notice requirement. For example, in *Williams v. United States*, 711 F.2d 893 (9th Cir. 1983) (*Williams*), we recently applied a literal interpretation of rule 15(c) in a case quite similar to Cooper's. The plaintiff filed her action against the Federal Aviation Administration (FAA) seven days before the statutory limitations period expired. The district court subsequently granted the FAA's motion to dismiss because the United States was the only proper defendant for the plaintiff's action under the Suits in Admiralty Act. We upheld the district court's denial of

the plaintiff's rule 15(c) motion to name the United States as a defendant because the United States did not receive notice of the action until one day after the statutory limitations period had run. *Id.* at 898.

Although *Williams* involved the Suits in Admiralty Act rather than Title VII, it disposes of this case. Like the *Williams* plaintiff, Cooper did not file her action until the relevant statutory limitations period had almost expired. Again, like the *Williams* plaintiff, Cooper named the wrong party as the defendant and attempted to correct her error by amending her pleading so that it would relate back under rule 15(c). Thus, as in *Williams,* we find that Cooper's failure to notify the substitute defendant of the institution of her action until after the statutory period had run precludes the application of rule 15(c).

Cooper argues that she should be allowed to amend her complaint under rule 15(c) because the Postmaster General had informal notice of her claim within the statutory period. In making this argument, Cooper's reliance on our recent decision in *Korn* is misplaced. There, we indicated that "notice of the institution of the action" sufficient to allow substitution of a defendant under rule 15(c) could be informal as well as formal. 724 F.2d at 1399. Under the unique facts of that case, we determined that a ship's owners had adequate notice of an injured passenger's suit when notice of the action's institution was given to another entity with which there was a "sufficient community of interest." *Id.* at 1400-01. In the present case, Cooper contends that the Postmaster General had informal notice of her action because of USPS's participation in the administrative proceedings which preceded the filing of her Title VII action. This argument fails for two reasons. First, the filing of an administrative claim does not impute notice of "the institution of the action"—which is the only notice relevant to rule 15(c). *See Korn,* 724 F.2d at 1400; *Williams,* 711 F.2d at 898; *see also Archuleta v. Duffy's Inc.,* 471 F.2d at 35 ("We cannot say that knowledge of the existence of a potential [Title VII] action (gained through participation in administrative proceedings) constitutes, per se, reasonable grounds for notice of the institution of an action."). Second, even assuming there was a "sufficient community of interest" between the Postmaster General and the governmental parties who were eventually served, Cooper failed to give any of them notice of her action within the statutory period established by 42 U.S.C. § 2000e-16(c). She thus may not now assert the type of imputed notice we found in *Korn.*



## III

We recognize that our literal interpretation of rule 15(c) and the short limitations period established by 42 U.S.C. § 2000e-16(c) combine to produce a seemingly harsh result in this case. Such apparently harsh results in individual cases, however, may be the inevitable corollary of our obligation in all cases to follow precedent and to implement controlling statutes and procedural rules. We may ignore neither the limitations on the filing of Title VII actions contained in section 2000e-16(c) nor the notice requirement for the substitution of parties in amended pleadings established by the plain language of rule 15(c). Whatever hardship these combined provisions work on Title VII plaintiffs can be alleviated only by Congress and the drafters of the Federal Rules of Civil Procedure.

To some extent, rule 15(c) already protects diligent parties litigating against the federal government. The rule's drafters specifically recognized that the relation back of pleadings amended to substitute new defendants was a "problem [that] has arisen most acutely in certain actions by private parties against officers or agencies of the United States." Fed. R. Civ. P. 15 advisory committee note on 1966 amendment. To remedy this problem, rule 15(c) was amended in 1966 to allow parties to give proper notice of the institution of an action by serving process on the "United States Attorney, . . . or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named . . . ." Fed. R. Civ. P. 15(c). Thus, Cooper could have preserved her Title VII action by serving a copy of the complaint on either the United States Attorney or the Attorney General before October 30, 1982. She failed to do so.

AFFIRMED.



## APPENDIX B

United States District Court,
S.D. California

August 2, 1984

No. C 82-1475-T-(M)

KAREN A. COOPER, PLAINTIFF,

*v.*

UNITED STATES POSTAL SERVICE,
and DOES 1 through 50, inclusive,
DEFENDANT-APPELLEE

### ORDER

HOWARD B. TURRENTINE, District Judge.

The Government moves to dismiss this complaint for lack of subject matter jurisdiction under Rule (b)(1), lack of personal jurisdiction under Rule 12(b)(2), and failure to state a claim upon which relief can be granted under Rule 12(b)(6). It moves in the alternative to strike under Rule 12(f) the allegations referring to 28 U.S.C. §§ 1343(3) and 1343(4), 42 U.S.C. §§ 1983 and 1985, plaintiff's prayer for injunctive relief, compensatory and punitive damages, and plaintiff's request for a jury trial. The Court need only concern itself with the motions to dismiss for lack of subject matter jurisdiction and failure to state a claim.

On December 1, 1980, plaintiff Karen Cooper filed a complaint for sex-based employment discrimination with the U.S. Postal Service's Department of Equal Opportunity. On September 30, 1982, Cooper received a letter

from the Department informing her of the claim's denial. In accord with 42 U.S.C. § 2000e-16(c), the notice informed Cooper that she was entitled to bring an action in federal court within thirty days of receipt. On October 29, 1982, one day before the running of the statute, Cooper filed a complaint under 42 U.S.C. §§ 1983, 1985, 1986 and 2000e-16(c) against the U.S. Postal Service and Does 1 through 50, inclusive. The papers do not disclose the date of service on the U.S. Postal Service; the U.S. Attorney, the U.S. Attorney General and the Postmaster General were served in January and February of 1983. Cooper does not deny that service of the complaint was not effected on any of the above parties during the thirty day period.

The government's motions to dismiss are based *inter alia* on the exclusive nature of 42 U.S.C. § 2000e-16(c) as a remedy for federal employment discrimination, and Cooper's failure to serve the proper party defendant within the thirty day time period set forth in the statute.

A. *Rule 12(b)(6) motion*

Counts 2, 3, 6, 7 and 8 of the complaint are pleaded under 42 U.S.C. §§ 1983, 1985 and 1986. Title VII, however, provides the exclusive remedy for federal employment discrimination. *Brown* v. *General Services Administration,* 425 U.S. 820, 835 (1976); *Mosley* v. *U.S.*, 425 F. Supp. 50, 54-55 (N.D.Cal. 1977). Therefore, the above counts should be dismissed.

B. *Rule 12(b)(1) motion*

Counts 1, 4 and 5 of the complaint are pleaded under Title VII of the Civil Rights Act of 1964. Under Title VII, the proper party defendant is the "head of the department,



agency or unit, as appropriate." 42 U.S.C. § 2000e-16(c); *Hackley* v. *Roudebush*, 17. U.S.App. D.C. 376, 520 F.2d 108, 115 n.17 (D.C.Cir. 1975); *Mosley* v. *U.S., supra.* Cooper named only the U.S. Postal Service and Does 1-50 as defendants. Hence, the above counts should also be dismissed.

Plaintiff requests that leave be granted to amend her complaint under Rule 15(c), and further, that such amendment relate back to the thirty day limitation period in the absence of a showing of prejudice by the Government. Relation back under Rule 15(c) requires, however, that actual notice be received by the Government within the period provided by law for commencing the action. *Stewart* v. *U.S.*, 655 F.2d 741, 742 (7th Cir. 1981); *see also Craig* v. *U.S.*, 413 F.2d 854, 857-858 (9th Cir.), *cert. denied,* 396 U.S. 987 (1969). Such notice must comply with Rules 4(d)(4) and (5). *Advisory Committee Note on Rule 15(c),* 39 F.R.D. 82, 83 (1966). No notice, formal or informal, was provided to the Government within the thirty day period. Moreover, application of Rule 15(c) in the absence of proper notice within the limitations period would result in prejudice by eliminating the Government's statute of limitations defense. *Wood* v. *Worachek,* 618 F.2d 1225, 1229 (9th Cir. 1980). Hence, leave to amend under Rule 15(c) is denied.

ACCORDINGLY, IT IS HEREBY ORDERED that the complaint is dismissed in its entirety with prejudice.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-6106
DC CV 82-1475 HBT

KAREN A. COOPER, PLAINTIFF/APPELLANT

*v.*

U.S. POSTAL SERVICE, DEFENDANT/APPELLEE

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered JULY 12, 1983



## APPENDIX D

United States Postal Service
Western Regional Office
San Bruno, CA 94099-0001

EEO# 5-1-0153-1

Certified #7529630
Return Receipt Requested

Sept. 24, 1982

Ms. Karen A. Cooper
1663 Oliver Avenue
San Diego, California 92109

Dear Ms. Cooper:

Reference is made to your complaint of discrimination filed with the EEO Branch, U.S. Postal Service, Western Regional Headquarters, San Bruno, California on December 1, 1980, against the San Diego, California Post Office.

The complaint was accepted and assigned for investigation on August 19, 1981. You were provided a copy of the investigative report May 17, 1982 and an informal adjustment attempt was conducted in August, 1982. You were advised of the District Manager's proposed disposition of your complaint by letter dated September 3, 1982. The disposition letter specifically set forth time limits for appeal, and it was received by you on September 7, 1982.

The time limits for appeal expired on September 22, 1982. To this date, you have not responded. Therefore, in

accordance with EEOC Regulations, I have adopted as the final agency decision the recommended finding of no discrimination as outlined in the September 3, 1982 notice of proposed disposition. Your case is now closed on the present record with a finding of no physical handicap and sex discrimination.

If you are dissatisfied with this final decision, you have the following appeal rights:

You may appeal to the Equal Employment Opportunity Commission within 20 calendar days of receipt of the decision.

*Your appeal should be addressed to the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appeals and any representations in support thereof must be submitted in duplicate.*

The Equal Employment Opportunity Commission appeal time limit regulation under 29 CFR Part 1613 is: 1613.233 Time Limit: (a) Except as provided in paragraph (b) of this section, a complainant may file a notice of appeal at any time up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. An appeal shall be deemed filed on the date it is postmarked, or in the absence of a postmark, on the date it is received by the Commission. Any statement or brief in support of the appeal must be submitted to the Commission and to the defendant agency within 30 calendar days of filing the notice of appeal. For purposes of this Part, the decision of an agency shall be final only when the agency makes a determination on all of the issues in the complaint, including whether or not to award attorney's fees or costs. If a determination to award attorney's fees or costs is made, the decision will not



be final until procedure is followed for determining the amount of the award as set forth in 1613.271(c).

(b) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based upon a written statement by the complainant showing that he or she was not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond his or her control prevented the filing of a Notice of Appeal within the prescribed time limit, the Commission exercises its discretion to extend the time limit and accept the Appeal.

*In lieu of an appeal to the Commission,* you may file a civil action in an appropriate U.S. District Court within 30 days of receipt of the decision.

If you elect to appeal to the Commission's Office of Review and Appeals, you may file a civil action in a U.S. District Court within 30 days of receipt of the Commission's final decision.

A civil action may also be filed anytime after 180 days of the date of the initial appeal to the Commission, if a final decision has not been rendered.

Joseph R. Caraveo
Regional Postmaster General

cc: Sexton Associates (by Certified #7529631)
J. Ron Sexton
330 Kalmia Street
San Diego, CA 92101

cc: District Manager, Sunland
Postmaster, San Diego, CA
EEO Specialist, Sunland

bcc: 231/orig/fltr/c/r
WE231:JStribling:hm:09/24/82